

November 12, 2009

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
Civil Action No. 09-953

RECEIVED

DEC - 9 2009

JOEL SCHNEIDER,⁹
U.S. Magistrate Judge

In Regard to the Matter of:

Bayside State Prison
Litigation
HENRY MITCHELL

OPINION/REPORT
OF THE
SPECIAL MASTER

-vs-

WILLIAM H. FAUVER, et al,
Defendants.

* * * *

THURSDAY, NOVEMBER 12, 2009

* * * *

BEFORE THE HONORABLE JOHN W. BISSELL, SPECIAL MASTER

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5 Transcript of proceedings in the above
6 matter taken by Theresa O. Mastroianni, Certified
7 Court Reporter, license number 30X100085700, and
8 Notary Public of the State of New Jersey at the
9 United States District Court House, One Gerry Plaza,
10 Camden, New Jersey, 08102, commencing at 1:27 PM.

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23 856-546-1100

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2 A P P E A R A N C E S:

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1 JUDGE BISSELL: I am reopening
2 proceedings in the case of Henry Mitchell, docket
3 number 09-953.

4 This opinion/report is being issued
5 pursuant to the directives of the Order of Reference
6 to a Special Master and the Special Master's
7 Agreement and the guiding principles of law which
8 underlie this decision to be applied to the facts
9 upon which it is based as set forth in the jury
10 instructions in the Walker and Mejias jury charges to
11 the extent applicable to the allegations of Mr.
12 Mitchell.

13 As finalized after review under Local
14 Civil Rule 52.1, this transcript will constitute the
15 written report required under paragraph seven of the
16 Order of Reference to a Special Master.

17 Henry Mitchell was assigned to Trailer
18 Number One upon his arrival at Bayside State Prison
19 from Saint Francis Hospital on or about the 14th of
20 July, 1997. At the time of the lockdown on
21 July 30th, he was still awaiting classification in
22 Trailer Number One. At a later point he went to
23 Trailer Number Five.

24 Mr. Mitchell brought a cane with him
25 from Saint Francis based upon the medical condition

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1 which may have been diagnosed as a stroke, but in any
2 case left him disabled on one side and required the
3 assistance of a cane for walking.

4 I find, as he testified, that upon his
5 exit from Trailer Number One to the gym, when Trailer
6 Number One was searched, which I'll explore more
7 fully in a few minutes, his cane was confiscated.
8 Under the circumstances of the lockdown, the cane
9 could have been considered a weapon at that point.
10 He was not permitted to use it on his way to and from
11 the gym.

12 I have considered the testimony of
13 Officer Beck which I find quite credible in other
14 respects, but Officer Beck testified that under no
15 circumstances would Mr. Mitchell have had a cane in
16 Trailer Number One.

17 I find that we had here a situation
18 which was an exception to the general rule because he
19 had only just arrived at BSP, had needed a cane
20 because of diagnoses and treatment at Saint Francis
21 and that in addition, he was awaiting classification
22 to another one of the trailers or units. Presumably
23 the question of his cane would have been dealt with
24 at that time. So I do find that in this case Mr.
25 Mitchell did have a cane when he arrived and the cane

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1 was confiscated at the time that the unit was
2 evacuated for search.

3 Mr. Mitchell alleges that on the date
4 when Trailer Number One was searched, he was
5 assaulted in two ways and in two fashions by SOG
6 officers. He alleges that he received blows to the
7 head while lying on his bed as ordered in his
8 residential area before being strip searched and
9 removed for transport to the gym. I find, however,
10 that those allegations are unproven and they are
11 adequately contradicted by the testimony of Officer
12 Beck.

13 Officer Beck was the housing officer on
14 the unit on the occasion of Mr. Mitchell's extraction
15 for the purpose of the unit search. And I'm going to
16 quote from some of her testimony, because I think
17 it's telling here with regard to the question of
18 whether Mr. Mitchell was struck by SOG officers at
19 that extraction or not.

20 Begin at page 82, line 13 of the
21 transcript of March 9th, 2009. I note
22 parenthetically that this removal and search of the
23 trailer occurred on the 12th of August, 1997.

24 Now, undertaking that quotation.

25 "Question: Okay. And when the inmates

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1 were taken out of the trailer -- well, let me ask
2 you, how are the inmates taken out of the trailer, do
3 you remember?

4 "Answer: They were told by myself one
5 wing at a time to get up and go outside.

6 "Question: Now, where were the SOG
7 officers at that time?

8 "Answer: They were on the wings. And
9 there was like one in the dayroom and then maybe ten
10 foot later there was another one in the dayroom out
11 to the door and down the walkway.

12 "Question: Now, when SOG was in the
13 Trailer One and they were taking the inmates out of
14 the wings, were you able to see down the wings?

15 "Answer: Yes.

16 "Question: How come?

17 "Answer: Because I went down the wings
18 to clear them.

19 "Question: And on that particular day
20 do you have any recollection of seeing -- let me step
21 back. I'm sorry.

22 Were you able to see the inmates as
23 they were made to get off their bunks?

24 "Answer: Yes.

25 "Question: And do you remember SOG

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1 striking any inmate with their batons?

2 "Answer: No.

3 "Question: Did you ever see any SOG
4 hit any inmate on that day in the head?

5 "Answer: No.

6 "Question: Do you have any
7 recollection of the SOG hitting Mr. Mitchell in the
8 head with their batons on that day?

9 "Answer: No."

10 Then in response to a question from me
11 when I asked what clearing the wing meant, he said it
12 didn't mean unlocking any doors because there weren't
13 locks there. She said, so I would just go down and
14 tell them to get off their beds and let's go. So I
15 find the testimony of Officer Beck credible that she
16 was actually in the wings assisting with instructions
17 for the inmates to clear their beds for purposes of
18 extraction and witnessed no such beating as the
19 plaintiff testifies. And I find the testimony of
20 Ms. Beck credible in that respect.

21 Mr. Mitchell also testified about being
22 hit and struck by sticks repeatedly while on his way
23 to and from the gym by SOG officers. However, his
24 testimony both before the court and otherwise
25 reflects significant discrepancies regarding the

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1 amount and the nature of the hits by SOG in coming
2 and going from the gym. I find that at the most he
3 has established, and this is evident from a film clip
4 which was viewed, he did walk with a slight limp.
5 And I find it would be credible that he would be
6 prodded by the SOG from time to time to keep up the
7 pace remembering that he had to walk without his
8 cane. However, under the circumstances, I would not
9 find such prodding or directives to keep up with the
10 pace of other inmates as amounting to excessive
11 force. In fact, it was minimal force and also not
12 any punishment.

13 I note further that the credibility of
14 Mr. Mitchell is also impacted here by his rather
15 categorical statements from time to time that during
16 the lockdown the residents of Trailer Number One
17 where he was had had a complete absence of showers,
18 access to phones or mail. However, a review of the
19 log book reveals that these programs were in place on
20 or before August 5, 1997 when Officer Beck returned
21 to duty. And furthermore, reviewing the log
22 indicates that some of them began as early as
23 August 1st. So that Mr. Mitchell's credibility or at
24 least the accuracy of his recollection of events in
25 my view is significantly impacted by his testimony

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1 regarding the unavailability of showers, phone
2 contact and mail in the trailer.

3 He also alleges that once reassigned to
4 Trailer Number Five, he made himself a homemade head
5 rag out of a sweat shirt, (I believe using the sleeve
6 if I recall correctly), and that one of the
7 corrections officers came in, snatched that head rag
8 from his head and pushed him back onto his bunk. He
9 claims that in falling back on to his bunk, he was
10 injured because he ran into a corner or a hard part
11 of the bunk structure. I find that at the very most
12 that injury, about being pushed back onto the bunk,
13 was a result of the officer's negligence. It does
14 not indicate that there was any intentional or
15 excessive use of force, any effort to punish or
16 anything beyond what might be necessary merely to
17 prod the plaintiff, Mr. Mitchell, back onto his bed.
18 The question of whether or not the head rag could
19 properly be seized is not an issue that is within the
20 confines of the assignment of this matter to me as a
21 Special Master.

22 Accordingly, I find that Mr. Mitchell
23 has failed in his burden of proof to sustain his
24 allegations of any of the assaults and/or uses of
25 excessive force against him concerning which he

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1 testified here.

2 Finally, although not every item of
3 evidence has been discussed in this opinion/report,
4 all evidence presented to the Special Master was
5 reviewed and considered.

6 For the reasons set forth above, I
7 recommend in this report that the district court
8 enter an order and judgment of no cause for action
9 with regard to Henry Mitchell.

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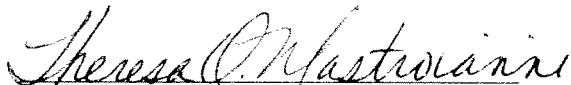
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1 C E R T I F I C A T E
2

3 I, Theresa O. Mastroianni, a Notary Public and
4 Certified Shorthand Reporter of the State of New
5 Jersey, do hereby certify that the foregoing is a
6 true and accurate transcript of the testimony as
7 taken stenographically by and before me at the time,
8 place, and on the date hereinbefore set forth.

9 I DO FURTHER CERTIFY that I am neither a
10 relative nor employee nor attorney nor counsel of any
11 of the parties to this action, and that I am neither
12 a relative nor employee of such attorney or counsel,
13 and that I am not financially interested in the
14 action.

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19 Theresa O. Mastroianni, C.S.R.
20 Notary Public, State of New Jersey
21 My Commission Expires May 5, 2010
22 Certificate No. XI0857
23 Date: November 20, 2009
24
25

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<p>A</p> <p>able 7:14,22 absence 9:17 access 9:18 accuracy 9:24 accurate 12:6 action 1:2 11:8 12:11,14 addition 5:21 adequately 6:11 Agreement 4:7 al 1:9 allegations 4:11 6:10 10:24 alleges 6:3,6 10:3 amount 9:1 amounting 9:10 and/or 10:24 Answer 7:4,8,15 7:17,24 8:2,5,9 applicable 4:11 applied 4:8 area 6:8 arrival 4:18 arrived 5:19,25 asked 8:11 assaulted 6:5 assaults 10:24 assigned 4:17 assignment 10:20 assistance 5:3 assisting 8:16 attorney 12:10 12:12 ATTORNEYS 3:7,14 Audubon 2:22 August 6:23 9:20,23 awaiting 4:21 5:21</p> <p>B</p> <p>back 7:21 10:8,9</p>	<p>10:12,17 based 4:9,25 batons 8:1,8 Bayside 1:5 4:18 beating 8:18 Beck 5:13,14 6:12,13 8:15 8:20 9:20 bed 6:7 10:17 beds 8:14,17 began 9:22 believe 10:5 beyond 10:16 BISSELL 1:21 4:1 blows 6:6 book 9:19 brought 4:24 BSP 5:19 bunk 10:8,9,11 10:12 bunks 7:23 burden 10:23</p> <p>C</p> <p>C 3:2 12:1,1 Camden 2:10 3:6 cane 4:24 5:3,7,8 5:15,19,23,25 5:25 9:8 case 4:2 5:2,24 categorical 9:15 cause 11:8 Certificate 12:21 Certified 2:6,20 12:4 certify 12:5,9 charges 4:10 circumstances 5:8,15 9:8 Civil 1:2 4:14 claims 10:9 classification 4:21 5:21</p>	<p>clear 7:18 8:17 clearing 8:11 clip 9:3 come 7:16 coming 9:1 commencing 2:10 Commission 12:20 complete 9:17 concerning 10:25 condition 4:25 confines 10:20 confiscated 5:7 6:1 considered 5:9 5:12 11:5 constitute 4:14 contact 10:2 contradicted 6:11 corner 10:10 corrections 10:7 correctly 10:6 counsel 12:10,12 court 1:1 2:7,9 2:20 8:24 11:7 credibility 9:13 9:23 credible 5:13 8:15,20 9:5 C.S.R 12:19</p> <p>D</p> <p>date 6:3 12:8,21 day 7:19 8:4,8 dayroom 7:9,10 dealt 5:23 decision 4:8 Defendants 1:10 3:14 diagnosed 5:1 diagnoses 5:20 directives 4:5 9:9</p>	<p>disabled 5:2 discrepancies 8:25 discussed 11:3 district 1:1,2 2:9 11:7 docket 4:2 door 7:11 doors 8:12 duty 9:21</p> <p>E</p> <p>E 3:2,2 12:1,1 early 9:22 effort 10:15 employee 12:10 12:12 enter 11:8 ESQUIRE 3:5 3:10,11,12 ESQUIRES 3:4 established 9:3 et 1:9 evacuated 6:2 events 9:24 evidence 11:3,4 evident 9:3 exception 5:18 excessive 9:10 10:15,25 exit 5:5 Expires 12:20 explore 5:6 extent 4:11 extraction 6:14 6:19 8:18</p> <p>F</p> <p>F 12:1 fact 9:11 facts 4:8 failed 10:23 falling 10:9 fashions 6:5 FAUVER 1:9 film 9:3</p>	<p>finalized 4:13 Finally 11:2 financially 12:13 find 5:4,13,17,24 6:9 8:15,19 9:2 9:5,9 10:11,22 Five 4:23 10:4 foot 7:10 force 9:11,11 10:15,25 foregoing 12:5 FORMAROLI 2:19 forth 4:9 11:6 12:8 Francis 4:19,25 5:20 fully 5:7 further 9:13 12:9 furthermore 9:21</p> <p>G</p> <p>general 5:18 Gerry 2:9 go 7:5 8:13,14 going 6:15 9:2 GRIEGEL 3:9 3:12 guiding 4:7 gym 5:5,11 6:9 8:23 9:2</p> <p>H</p> <p>H 1:9 HAMILTON 3:13 hard 10:10 head 6:7 8:4,8 10:4,7,8,18 Henry 1:7 4:2,17 11:9 hereinbefore 12:8</p>
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